IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

TUESDAY, THE 17TH JULY 2007 / 26TH ASHADHA 1929

CRL.A.No. 852 of 2007()

SC.53/2007 of ADDL.SESSIONS COURT (ADHOC-I), KOTTAYAM

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APPELLANT: ACCUSED NO.2

M.N.SHAJI, S/O.NARAYANAN,
MUKALEL HOUSE, EDAMATTOM P.O., EDAMATTOM DESOM,
POOVARANI VILLAGE, MEENACHIL TALUK.

BY ADV. SRI.C.C.THOMAS

RESPONDENT: COMPLAINANT

STATE OF KERALA REPRESENTED BY
EXCISE INSPECTOR, EXCISE RANGE OFFICER,
KANJIRAPPALLY, KOTTAYAM DISTRICT
BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

BY PUBLIC PROSECUTOR SRI. PUZHAKKARA MUHAMMED.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 2/07/2007, THE COURT ON 17.7.2007 DELIVERED THE FOLLOWING:

ORDER IN CRL.M.A.NO.5592 OF 2007 IN CRL.APPEAL NO.852 OF 2007.

DISMISSED

17.7.2007 Sd/-(K.THANKAPPAN, JUDGE)

K.THANKAPPAN, J.

CRL. APPEAL NO. 852 OF 2007

Dated this the 17th day of July, 2007

JUDGMENT

The appellant is the second accused in S.C. No.53 of 2007 on the file of the Additional Sessions Court (Ad hoc-I), Kottayam. He faced trial for the offences punishable under Section 57 A(1)(iii) of the Abkari Act and Section 22(a) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as " the N.D.P.S. Act").

2. The prosecution case against the appellant and the other accused was that on 13.2.2006 at about 3.05 p.m. when the Preventive Officer of Excise Circle Office, Ponkunnam inspected toddy shop No.20, he found 190 litres of toddy which, in contravention of the licence granted to the second accused, was seen mixed with 0.98 mg./100 ml of diazepam, a noxious substance which is likely to endanger human life. The second accused was the licensee of the said toddy shop and the first accused was the Manager of the shop. To prove the case against the appellants, the prosecution examined PWs.1 to 8 and produced Exts.P1 to P5 as well as

MO.1. On the side of the first accused DW.1 was examined and Exts.D1 and D2 were produced. Ext.X1 is the yearly statement of wages paid to workers of toddy shop No.20. No oral or documentary evidence was adduced on the side of the second accused. After closing the prosecution evidence, the accused were questioned under Section 313 Cr.P.C. Both the accused denied the allegations levelled against them. The first accused filed a written statement stating that he never worked as Manager of the toddy shop in question and that he was the driver of an autorickshaw owned by him since January, 2004. The second accused also stated that he had no connection with the said toddy shop. However, considering the evidence adduced by the prosecution, the trial court found the second accused guilty of the offence , convicted him thereunder and sentenced him to undergo rigorous imprisonment for three years and to pay a fine of Rs.25,000/- and in default of payment of fine, to undergo rigorous imprisonment for a further period of three months under Section 57A(1) (iii) of the Abkari Act. He was also sentenced to undergo rigorous imprisonment for six months and to pay a fine of Rs.10,000/- and in default of payment of fine, to undergo rigorous imprisonment for a further period of one month under Section 22(a) of the N.D.P.S. Act. Both the sentences were ordered to run concurrently. Set off was also granted under Section 428 Cr.P.C. The first accused was found not guilty and he was

acquitted. The above judgment of the trial court is challenged in this appeal.

3. This court heard the learned counsel appearing for the appellant as well as the learned Public Prosecutor for and on behalf of the respondent.

4. Learned counsel appearing for the appellant contended that the allegation that the appellant is the licensee of toddy shop No.20 of Parathodu is not supported by any legally admissible evidence and that as the first accused was acquitted finding him not guilty, there is no evidence to prove the employment of the appellant as Manager of the toddy shop in question. Counsel further contended that if there is no evidence to prove the relationship between the appellant and the first accused, it is not possible to hold that the appellant was in possession of the contraband articles seized from the toddy shop. Another contention raised by the learned counsel for the appellant was that Ext.P2 chemical examination report relied on by the prosecution to prove that the toddy seized from toddy shop No.20 contained diazepam cannot be accepted as there is no evidence to show that the approved chemical test was conducted to come to such a conclusion. In this context learned counsel relied on the

decision of this Court reported in **Asokan v. State of Kerala, 1998(1) K.L.T. 265** wherein this Court had held that if necessary tests are not conducted, no reliance can be placed on the chemical analysis report. Lastly, it was contended by the learned counsel that Ext.P1 mahazar prepared by the detecting officer does not show that the business in the toddy shop in question was being conducted by the appellant.

5. The persons who attested the bottles containing the sample taken from the toddy shop in question were examined as PW.1 and 2. PW.3 was the Preventive Officer who detected the offence and prepared the sample. PW.4 was the Assistant Excise Commissioner, Kottayam. PW.5 was the Excise Sub Inspector, Pomkunnam and PW.6 was the Excise Circle Inspector of Kanjirappally Excise Range. PW.7 was the Excise Guard and PW.8 was the Special Squad Circle Inspector, Kottayam. The trial court relied on the evidence of PW.4, the Assistant Excise Commissioner, Kottaym who proved that toddy shop No.20 situated at Parathode was auctioned by the appellant. The trial court also relied on the evidence of PW.3, the Preventive Officer who inspected the toddy shop in question and seized 190 litres of toddy kept in the shop. This witness had prepared Ext.P1 mahazar in which he had stated that he had taken 500 ml. toddy each in two bottles, mixed it with 10 grams of benzoic powder and

prepared the sample for chemical analysis. Though an attempt was made to corroborate the evidence of this witness with the version given by PWs.1 and 2, they did not support the prosecution case. However, PWs.1 and 2 admitted their signature on the label of the two bottles of samples prepared by PW.3. The evidence of PWs. 1 and 2 would not prove that toddy shop No.20 actually belonged to the appellant . With regard to the first accused, even though the trial court accepted the evidence of PW.3 that the first accused was present in the toddy shop during the relevant time, the trial court found that there was no documents to show that the first accused was employed as Manager of the toddy shop. The only evidence adduced by the prosecution against the appellant was that he was the licensee of the toddy shop. But, that by itself is not a ground to hold that the contraband articles seized from the toddy shop in question were in the physical and conscious possession of the appellant. The prosecution also failed to prove that the appellant was conducting business in toddy shop No.20 during the relevant time. Neither PWs. 1 and 2 when questioned by the police or examined before the court below stated that they were employed by the appellant in the toddy shop. Except production of a copy of the licence, no other records were produced by the prosecution to prove that the appellant was conducting business in toddy shop No.20. The mahazar prepared by PW.3 only mentions the number of

the shop and not the name of the contractor. Further, the prosecution failed to prove the relationship between the appellant and the first accused as that of an employee and employer. In the above circumstances, the finding of the trial court that the appellant was conducting business in toddy shop No.20 and that he was in physical possession of the contraband articles is not sustainable.

6. With regard to Ext.P2 chemical examination report, it is not possible to hold that the sample analysed contained diazepam as per the principle laid down by this Court in the decision reported in **Asokan v. State of Kerala, 1998(1) K.L.T. 265.** In the above judgment, this Court held that it was mandatory on the part of the prosecution to conduct an approved scientific test for identification of diazepam in toddy. Even though the above judgment was challenged before the Apex Court, the observation made by this Court was not reversed by the Apex Court as can be seen in the order passed in Cr. Appeal Nos.53-60 of 1999 which arose out of S.L.P.(Crl.) Nos.663.670 of 1998. On the basis of the evidence adduced by the prosecution, it is clear that the chemical analyst had not conducted the mandatory test to identify the presence of diazepam in the sample analysed.

7. The next question to be considered is whether the appellant was responsible for keeping toddy mixed with diazepam in toddy shop No.20. It is not stated in Ext.P3 scene mahazar that the toddy shop in question was open and business was being conducted in the shop. Even though PWs.1 and 2 were questioned on this aspect, their evidence was not helpful to the prosecution. It is the duty of the prosecution to prove that the appellant, being the licensee of the shop was in possession of the contraband articles on the relevant day. The prosecution failed to adduce any evidence to prove that the appellant was in the shop or that he had any connection with the business being carried out in the shop. Though PW.1 had stated that the appellant was the owner of the shop, he admitted that he does not know the appellant personally and that he has got only hearsay evidence. PW.3 had also not stated that the appellant was in-charge of the toddy shop or that he was conducting business in the shop. The only piece of evidence which the prosecution had was that the licence stood in the name of the appellant. In order to attract Section 57 A(1)(iii)of the Abkari Act, it must be proved that the accused was in physical and conscious possession of the contraband articles. If that be so, the offences charged against the appellant are not proved.

8. This Court has already found that the prosecution failed to prove

the employer - employee relationship between the first accused and the appellant. Considering the entire facts and circumstances of the case, this Court is of the view that the finding of the trial court is not sustainable. Hence, , the impugned judgment is set aside. The appellant is found not guilty of any offences and he is acquitted of all the charges levelled against him.

The Crl. Appeal is accordingly allowed. The bail bonds executed by the appellant shall stand cancelled.

(K.THANKAPPAN, JUDGE)

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